United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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76-1259

To be argued by
STEVEN KIMELMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1259

UNITED STATES OF AMERICA,
Appellee,

—against—

JOSEPH DiGISO, ANTHONY CONTRERAS
and ANDREW BERRADA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Joseph DiGiso, Anthony Contreras and Andrew Berrada appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Platt, *J.*) entered on June 4, 1976 following a jury trial. Appellant DiGiso was convicted on two counts of theft of goods from interstate commerce and two counts of possession of the proceeds of the aforesaid thefts in violation of Title 18, United States Code, Section 659 and 2. Appellant DiGiso was also convicted of one count of conspiracy to commit the aforesaid substantive offenses in violation of Title 18, United States Code, Section 371. Appellants Berrada and Contreras were similarly con-

victed of a total of three counts each for theft, possession and conspiracy.[1]

Appellants were sentenced as follows: Appellant DiGiso received a total of eight years imprisonment; appellant Contreras received a total of five years imprisonment; and appellant Berrada received a total of seven years imprisonment. Appellants Contreras and Berrada are free on bail pending the outcome of this appeal. Appellant DiGiso is currently imprisoned.[2]

On this appeal, appellants DiGiso and Berrada contend that the trial court erred by its failure to charge, as requested, on multiple conspiracies. Related to this issue, appellant Berrada argues that a fatal variance occurred because the proof at trial disclosed multiple conspiracies rather than the single conspiracy charged in the indictment. Appellants Berrada and Contreras raise several additional points relating to their identification by means of a spread of photographs. Appellant Contreras also complains that the District Court erred in refusing him the right to display his right hand to the jury without being sworn and subject to cross-examination.

Appellant DiGiso raises four additional issues. He alleges that the trial court gave erroneous charges on "spe-

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[1] Appellant Berrada was acquitted of one count of theft and one count of possession of goods stolen from an interstate shipment. The fourth named defendant, Robert Dominici, was acquitted on all three counts for which he was charged, to wit; one count each of theft and possession and one count of conspiracy.

[2] Appellant DiGiso's eight year sentence on the instant indictment is to run concurrent with a three year term imposed in 74 CR 708(s), an unrelated conviction for possession of goods stolen from interstate commerce entered on April 18, 1976 after a plea of guilty. Following DiGiso's sentence in the instant case he surrendered, on June 18, 1976, to begin serving both sentences.

cific intent" and "recent possession of stolen property." Appellant DiGiso also claims that evidence of his subsequent similar criminal acts was not properly admitted. Finally, appellant DiGiso contends that his conviction for both the theft and possession of the same goods is duplicitous.

Statement of the Case

A. The Government's Case

In the early morning hours of April 27, 1973, Thomas Tavolacci, Albert (also known as "Albie") Strouse, and appellants DiGiso and Contreras met at the home of Tavolacci's girlfriend on East Third Street in Brooklyn.[3] They had previously arranged to meet there before going out to look for a truck to hijack (52-57).[4] The four men thereafter proceeded to the vicinity of the Verrazano Bridge and the Brooklyn-Queens Expressway. They soon spotted a United Merchants tractor-trailer and followed it to the vicinity of Church and Worth Streets in Manhattan. Tavolacci then forced the two drivers at gunpoint to get into Tavolacci's car which was being driven by appellant Contreras. Appellant DiGiso and unindicted co-conspirator Strouse stayed with the hijacked truck (60-62, 445-447).

Tavolacci and appellant Contreras drove the kidnapped drivers around for several hours. During that ride the

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[3] Tavolacci and Strouse were named as unindicted co-conspirators. Tavolacci, who testified for the government in the instant case, had provided information and testimony to the United States concerning his participation in over thirty thefts of stolen goods. Strouse who had been previously found dead in the trunk of an abandoned car, was not named as a defendant (58-59).

[4] All references are to the trial transcript unless otherwise indicated.

drivers, Guy Snell and Hoyt Shead, heard Tavolacci call appellant Anthony Contreras by the name "Tony" (453-454). Appellant Contreras and Tavolacci also discussed a friend of their's who was named "Andrew" (453-454).[5]

Eventually releasing the drivers, Tavolacci subsequently met with appellant DiGiso. DiGiso told Tavolacci that he and Strouse had taken the hijacked load of piece goods to the Harris Department Store in Montclair, New Jersey where they had unloaded it in the street, leaving bales of material on the truck (65).[6] Several days after the April 27 hijacking, Tavolacci accompanied DiGiso to the Harris store in New Jersey. He waited outside while DiGiso went in to collect the money. When appellant DiGiso came out he told Tavolacci they would have to see Bernard Mass' father who lived in Flushing, New York, to get money which was owed to them (66-67). Tavolacci subsequently went with DiGiso to an apartment house in Flushing. DiGiso went in alone but later told Tavolacci that he had collected the money from a man called either "Manny" or "Blackie" (67-68).[7]

On May 7, 1973, a second pre-dawn meeting occurred at Tavolacci's girlfriend's house. Attending were Tavo-

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[5] Andrew is the first name of appellant Berrada. Substantial uncontradicted evidence showed that both Tavolacci and appellant Contreras knew appellant Berrada (940-944).

[6] This testimony was corroborated by the owner of the Harris store, Bernard Mass. Mass identified a picture of Strouse as one of the men who had delivered the stolen goods. He was unable to similarly identify appellant DiGiso (368, 371, 506).

[7] Tavolacci's testimony in this regard is also completely corroborated. Mass testified he had asked his father, Manny (nicknamed "Blackie") to help him pay for the goods (384-385). In addition, telephone records showed several phone calls from appellant DiGiso's home to both Bernard Mass and Manny (Blackie) Mass approximately one week after the hijacking (940-944).

lacci and appellants DiGiso, Contreras and Berrada.[8] Again the four individuals left together in search of a truck to hijack (72-76). On this occasion, they observed a Cooper Motor Lines tractor-trailer in the vicinity of Hamilton Avenue, Brooklyn. Tavolacci and appellant Contreras approached the Cooper driver, Sam Brown, and ordered him at gun point into Tavolacci's car (571-573, 978). While Tavolacci and appellant Contreras drove Mr. Brown around for several hours, appellants Berrada and DiGiso disposed of the hijacked truck (73-74). During the ride, the kidnapped driver Brown heard Tavolacci refer to appellant Contreras as "Tony" (568).[9] Later that day, appellant DiGiso informed Tavolacci that the contents of the hijacked Cooper truck could not be sold and were therefore left on the abandoned truck (74-75).

On May 29, 1973, a third early morning meeting was held on Third Street in Brooklyn. The participants on this occasion were Tavolacci, Strouse, and appellants DiGiso and Berrada.[10]

The hijackers soon found a Cooper Motor Lines Truck parked in the vicinity of Canal Street and West Broadway in Manhattan (76-77). Tavolacci escorted the two Cooper drivers to a car driven by appellant Berrada (78). By amazing coincidence, one of the two Cooper drivers was Sam Brown, the individual who had been hijacked by Tavolacci and appellants Contreras, DiGiso and Berrada three weeks earlier.

At the trial, Sam Brown identified Tavolacci as being one of the hijackers who drove him around on both May

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[8] Albie Strouse was not present at this meeting.

[9] As previously noted, the United Merchant's driver, Snell, also heard Tavolacci refer to appellant Anthony Contreras as "Tony" during the April 27, 1976 hijacking (453-454).

[10] Appellant Contreras was not present at this meeting.

7, 1973 and May 29, 1973. (579). He was unable, however, to make an in-court identification of either Contreras or Berrada (575). Brown was then allowed to testify as to his prior out-of-court identifications of both Contreras and Berrada. The basis of these identifications were two photo spreads shown to the witness Brown; one containing appellant Contreras' photograph, and the other containing appellant Berrada's photograph. Brown identified both appellants' photographs as resembling the individual who had accompanied Tavolacci on the May 29, 1973 hijacking. (576-582). He was quite sure, however, that the same individual did not accompany Tavolacci on both occasions. Because Tavolacci had identified appellant Contreras as participating in the first hijacking and appellant Berrada in the second hijacking, the United States argued, without objection, that Brown had simply misidentified Contreras as participating in the second hijacking instead of the first one. (931-932).

Sometime after the May 29, Cooper Motor Lines hijacking, Tavolacci again met with appellant DiGiso. DiGiso informed Tavolacci that he had sold the load of yarn to a person named "Bob" at a company called Vanguard Knits located in Brooklyn (79).

On June 28, 1973, a fourth pre-dawn meeting occurred in Brooklyn involving Tavolacci, appellants DiGiso and Berrada and defendant Robert Dominici (86).[11] After

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[11] According to Tavolacci, appellant Berrada had introduced him to Dominici several months before this meeting. Dominici thereafter participated in several conversations when Berrada, Tavolacci and Contreras had discussed the two Cooper Motor Line hijackings (84-85). This led up to a conversation on the evening of June 27, 1973, during which Tavolacci and Berrada invited Dominici to take the place of appellant Contreras and unindicted co-conspirator Strouse on a highjacking planned for the next day (85-86).

leaving the house on East Third Street, Tavolacci, Berrada, DiGiso and Dominici followed a Carolina Mills truck from the area of the Verrazano Bridge to Flatbush Avenue in Brooklyn. On this hijacking, Tavolacci again took the two drivers and placed them in his car which Dominici was driving. Following the previously established pattern, Tavolacci was later informed by DiGiso that the truck's contents of yarn were also fenced to "Bob" of Vanguard Knits. (89).

Robert Trabulsi, the general manager of Vanguard Knits, testified that he received both shipments from appellant Joseph DiGiso whom he knew as "Jim Giosa" (277-278, 280-282, 285-286). Trabulsi also identified appellant Berrada as the individual who had twice accompanied appellant DiGiso when he came to Vanguard to collect money from Trabulsi (89, 334).

Tavolacci was arrested by the Federal Bureau of Investigation on July 16, 1973, two weeks after the June 28 Carolina Mills hijacking (90). On the morning of his arrest, Tavolacci had been riding around with appellants DiGiso and Contreras looking for a truck to hijack (99-100).[12]

B. The Defense Case

1. Appellant Contreras

Appellant Contreras and the United States stipulated to the entry of a Federal Bureau of Investigation interview with one of the United Merchant drivers Hoyt Shead, hijacked with Guy Snell on April 27, 1973.[13] Shead was

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[12] This testimony was corroborated by FBI agent Thomas Armstrong, who observed Tavolacci, DiGiso, and Contreras riding in Contreras' car on the morning of July 16, 1972 (717-721, 831).

[13] Guy Snell testified for the United States (446-460).

unavailable to both sides as a witness (845, 848). Shead's FBI interview generally paralleled the trial testimony of Snell with the exception that Shead stated that hijacker called "Tony" had an 1½ inch scar on the back of his right hand (849-854). Appellant Contreras offered to take the witness stand solely to deny that he had such a scar in April, 1973. When the trial court refused to limit cross-examination to this issue, appellant Contreras then offered to display his right hand to the jury without taking the witness stand. The trial court again refused this offer (874-876).

2. Appellant DiGiso

Appellant DiGiso did not testify. He called Ray Barske, an individual who, had allegedly given a person named "Jay" or "Jim", Bernard Mass' telephone number. According to Barske, Jay had "distressed merchandise" he wanted to sell so Barske recommended Mass as a likely outlet for it. Barske claimed that, although he was a good friend of DiGiso, DiGiso was not the "Jay" who had contacted Mass in conection with selling the proceeds of the April 27 hijacking (882-885).[14]

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[14] On cross-examination, however, Barske could not explain the fact that DiGiso had called Barske, and both Bernard and "Blackie" Mass on May 5, 1973, approximately one week after the April 27 hijacking of the United Merchants' truck (897).

ARGUMENT

POINT I

THERE WAS NO VARIANCE OF PROOF CONCERNING THE CONSPIRACY CHARGE OF THE INDICTMENT.

Appellant Berrada maintains that the United States proved the existence of multiple conspiracies instead of the single conspiracy charged in the indictment. According to appellant Berrada, citing to *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), this so-called variance mandates automatic reversal.

Appellant's argument must fail for two reasons. First, the uncontradicted proof showed that Tavolacci, DiGiso, Berrada, Contreras, Strouse and Dominici, regularly acted as an on-going, loose-knit band of hijackers, who would form up in groups of four depending on who was available on any particular day. Indeed, during the period charged in the indictment these six co-conspirators participated in a total of four hijackings. These four hijackings formed the basis for the conspiracy count and their respective involvement was as follows: (a) Tavolacci—hijackings of April 27, May 7, May 29, and June 28, 1973; (b) DiGiso—hijackings of April 27, May 7, May 29, and June 28, 1973; (c) Berrada—hijackings of May 7, May 29, and June 28, 1973; (d) Contreras—hijackings of April 27, and May 7, 1973; (e) Strouse—hijackings of April 27 and May 29, 1973; and (f) Dominici—hijacking of June 28, 1973.

Evidence of the continuity of this conspiracy, which extended over the relatively short period of 3 months, is easily illustrated, for example, by the circumstances

surrounding Dominici's participation in the conspiracy. Appellant Berrada introduced Tavolacci to Dominici, several months before the June 28, 1973 hijacking. Following this introduction Dominici had been present on several occasions when Tavolacci and appellants Berrada and Contreras had discussed their various hijackings. Finally a time came when appellant Berrada and Tavolacci asked Dominici to substitute for appellant Contreras and "Albie" Strouse on the June 28, 1973 hijacking (84-86). As this cursory outline clearly demonstrates, there was but a single conspiracy during the period charged in the indictment. The parties, throughout the period charged, planned the hijackings in concert; they followed a consistent and uniform *modus operandi;* and the core participants remained the same. Indeed, the only change that occurred was the fact that, on occasion, one person would be substituted for another. But even then, the substituted person became a full party to the planning, discussions, and ultimately, the operation of the illegal agreement. *See United States* v. *McClean*, 528 F.2d 1250, 1256 (2d Cir. 1976); *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).[15]

Appellant Berrada's argument also fails for a second reason. To succeed in his multiple conspiracy argument, appellant must be able to first show that the variance of proof of multiple conspiracies affected his "substantial rights". *Berger* v. *United States*, 295 U.S. 78, 82 (1935); *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975),

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[15] Other than generally citing *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (28 defendants) and *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), (60 co-conspirators), appellant Berrada's brief noticeably fails to cite anything in the instant record upon which to base his claim of multiple conspiracies (appellant Berrada's brief pp. 15-17).

cert. denied, — U.S. — (1976). Because appellant Berrada participated in three out of the four hijackings set forth in the conspiracy count of the indictment, it is difficult to conceive how he was prejudiced by the additional testimony concerning the April 27 hijacking which occurred approximately two weeks before he actively joined the conspiracy. *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962).

Indeed, in *United States* v. *Sir Kue Chin*, 2d Cir. decided April 21, 1976, a case in which a similar claim was made, this Court held that merely establishing that two conspiracies had been proved was insufficient to require a reversal. The *Chin* case recognized that since the joinder provisions of Rule 8, Federal Rules of Criminal Procedure, would have permitted both conspiracies to be joined in the same indictment, there was no prejudice. Although the *Chin* case involved only one defendant, the Government submits that the same rule should obtain where, as here, the complained of April 27 transaction included two of the three co-defendants who were tried with him. Thus, as was held in the *Chin* case, "even if the indictment could properly have charged only the Wong Lim aspect of the conspiracy, evidence of the later dealings with Mong Wong would still have been admissible to show appellant's intent with respect to the Wong Lim transactions." (*id.* at p. ....). So too in the instant case. Proof of the April 27 hijacking would have been admissible against Berrada to establish his intent to enter into the conspiracy charged; his knowledge of what he was doing; and the background and development of the conspiracy charged. Rule 404(b), Federal Rules of Criminal Procedure, see also, e.g., *United States* v. *Torres*, 519 F.2d 723 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).

POINT II

THE TRIAL COURT'S CHARGE ON CONSPIRACY WAS CORRECT.

Appellants urge that the trial court committed reversible error by its refusal to give a charge, which had been requested by Contreras, that dealt with multiple conspiracies. This requested charge, set forth in the margin, in effect, would have required the jury to convict if it found multiple conspiracies *and* that the particular defendant was a member "of all the conspiracies." On the other hand, the charge would have, by implication, required the jury to acquit if it found that there were more than one conspiracy *and* that the particular defendant "was a member of one conspiracy and not of the others."[16]

It is contended, for the first time on this appeal, that this request to charge is grounded in the cases of *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975), *cert. denied*, — U.S. — (1976) and *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). (Neither in the original request [Appellants' Joint Appendix p. 29] nor during the brief oral argument before the district court were these—or any other author-

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[16] The government has charged a single conspiracy. The defendants have tried to show that there was more than one conspiracy. It is for you to determine whether there was a single conspiracy or more than one conspiracy. If you find that there were more than one conspiracy, then you can find guilt of the conspiracy only against the persons who were members of all the conspiracies. If you find that a defendant was a member of one conspiracy and not of the others then you must find that defendant not guilty. It is for you to determine whether there was a single conspiracy or more than one conspiracy and it is for you to determine if a defendant was a member of only one conspiracy or more than one conspiracy.

ities—cited in support of the request or objection to the court's charge [1118-1119]. The Government submits that the requested charge incorrectly stated the law. Hence, the complained error is simply not available on this appeal, absent "plain error." Wright, Federal Practice and Procedure, § 482, pp. 278-279.

In the *Cohen* case, *supra*, this Court held that it was not improper for the trial court to charge, over defense objection, that ". . . if you find that the Government has failed to prove the existence of only one conspiracy, you must find the defendant's not guilty." (*Id.* at p. 735). This "all-or-nothing" charge, although earlier condemned, appears to be now permitted, when given in a context in which it is made clear that the jury has to consider the guilt or innocence of each defendant individually. See *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, — U.S. —, 96 S. Ct. 1742 (1976); *United States* v. *Sperling*, *supra*. Appellant's contend that upon request, they are entitled to such a charge.

This may be so. However, the charge which was requested below is not the *Cohen*-type charge nor even the substance of that charge. The requested instruction was not that "if the Government has failed to prove the existence of only one conspiracy you must acquit", but rather that the jury could convict if it found that the particular defendant was a member "*of all the conspiracies.*" This proposed instruction, therefore, incorrectly stated the charge which was approved in the *Cohen* and *Finkelstein* cases.

Since the requested instruction was incorrect, it is necessary to determine if it was "plain error" not to give

the correct "all-or-nothing" charge. Or in other words, was the trial court adequately alerted to what charge was being requested and whether the failure to give this charge would produce a miscarriage of justice. *Cf.* Rule 52(b), Federal Rules of Criminal Procedure. It is submitted that the failure to give the requested charge, if error at all, was at worst harmless error. First, the requested charge and accompanying oral argument (1118) did not clearly apprise the trial court what was actually requested. Nor were any authorities presented. Second, when the evidence at trial discloses multiple conspiracies, the error is one of variance. *United States* v. *Bertolotti*, 529 F.2d 149, 154 (2d Cir. 1975). And the test is whether the "substantial rights" of the appellant's have been affected. *Berger* v. *United States*, 295 U.S. 78, 82 (1935). This may be determined by judicial review since "the material inquiry is not the existence but the prejudicial effect of the variance" *United States* v. *Aqueci*, 310 F.2d 817, 827 (2d Cir. 1962). Here, as set forth in Point I, *supra*, there has been no prejudicial variance. Thus, the substantial rights of the appellants have not been affected. Third, the charge, as given adequately instructed the jury that, in order to convict they had to find that each particular defendant had participated in the conspiracy charged in the indictment. (For convenience, the district court's charge on this point is set out in the margin).[17] Finally, in view of the overwhelming

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[17] In your consideration of the evidence in the case as to the offense of the conspiracy charge [sic] you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not each of the accused wilfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that a defendant wilfully became a member of

[Footnote continued on following page]

evidence of a single conspiracy (See Point I, *supra*), the failure to give the requested charge (or a correct version) could not have prejudiced appellants. Indeed, even if the jury could somehow have concluded that the evidence established that any one defendant had participated in more than one conspiracy, under the instructions as given, the jury would still have had to conclude that that particular defendant had participated in the conspiracy charged in the indictment.

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the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators committed one or more overt acts in furtherance of some object or purpose of the conspiracy, then there may be a conviction.... Before the jury may find one or more or all of the defendants or any other person has become a member of the conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and the defendant or other person who is claimed to have been a member, wilfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. (Appellant's Joint Appendix P. 66)....

Now the indictment charges a conspiracy among all four defendants and Mr. Tavolacci and Mr. Strouse, all of whom are named in the indictment as co-conspirators. A person cannot conspire with himself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he participated in the conspiracy as charged with at least one other person. With this qualification you may find all of the defendants guilty or one of the defendants not guilty and some not guilty or all not guilty, all in accordance with these instructions and facts you find. (Appellant's Joint Appendix P. 68-69).

POINT III

THE EXTRAJUDICIAL IDENTIFICATION OF APPELLANTS BERRADA AND CONTRERAS BY HIJACK VICTIM, SAM BROWN, WERE PROPERLY ADMITTED INTO EVIDENCE.

Appellants Berrada and Contreras contend that prior out-of-court photographic identifications of them made by one of the hijacked truck drivers, Sam Brown, should not have been admitted into evidence. Appellants' contentions in this regard are frivolous.

To begin with, neither appellant argues that the identifications were not properly admissible pursuant to Rule 801(d)(1)(c) of the Federal Rules of Evidence. Instead, appellant Berrada chooses to characterize the photo spread involving him as "unfair" because Brown selected Berrada's photograph on the basis that appellant's "Italian eyes" resembled those of one of the hijackers. Appellant Contreras insists that his identification by Brown also on the basis of "Italian eyes," is unfair because Brown testified that the individual (believed to be appellant Contreras) in the May 7, 1973 hijacking wore sunglasses.[18] Both appellants' arguments are somewhat unique, but nonetheless completely specious.

Appellants' briefs fail to mention that a full *Simmons*[19] type hearing was held on their respective motions

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[18] It will be recalled that Brown identified both Contreras and Berrada as resembling the individual accompanying Tavolacci on the second Cooper Motor Lines (May 29, 1973) hijacking. Because both Tavolacci and Brown himself gave testimony indicating that Contreras had participated in the first hijacking and Berrada the second hijacking, the United States argued that Brown has mistakenly identified appellant Contreras as participating in the second hijacking instead of the first one (931-932).

[19] *United States* v. *Simmons*, 390 U.S. 377 (1968).

to suppress Brown's photo spread identifications. Brown testified (out of the jury's presence) as to the full circumstances surrounding the viewing of the two separate groups of photographs (509-559). At the conclusion of this hearing, the trial court denied the motions to suppress (554-559). Because neither appellant made any showing of unfairness as to either the photographs which comprised the spreads or the circumstances under which they were shown, this ruling was correct.

On this appeal Berrado does not challenge the trial court's ruling but instead seeks to avoid it. However, his reliance on *United States* v. *Simmons*, 390 U.S. 377 (1968) is misplaced. The Simmons decision holds, in part, as follows:

> . . . the danger that use of the technique [photographic spreads] may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error . . . we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (390 U.S. at p.).

Neither appellant Berrada nor appellant Contreras are able to point to or suggest any evidence that would bring their claims of an "unfair" identification within *Simmons*.

The trial court correctly denied appellants' motion to suppress the photographic identifications and held that appellants' arguments went to the weight of the proposed evidence and not its admissibility (554-559). Thereafter,

during the trial the witness, Brown, was fully cross-examined by appellants' counsel. Counsel for appellant Berrada concentrated his cross-examination on the issue of the "Italian eyes". Counsel for appellant Contreras likewise examined on the fact that the hijacker believed to be Contreras wore sunglasses during the hijacking so that his "Italian eyes" could not have been visible.[20] Moreover, both counsel spoke at great length during their summations on the alleged evident weaknesses in these identifications (970-973, 1002-1007). Thus, the jury in the instant case had ample opportunity to weigh Mr. Brown's identification testimony and measure it upon consideration of counsels' argument and the trial court's careful instructions on this subject.[21] Given the totality of the circumstances outlined above, appellants' challenge to the admission of the photographic identifications is totally without merit.

Appellant Contreras raises an additional issue on this appeal concerning the photographic spread offered in evidence against him. Appellant contends that a photograph of himself showing a front and side view with *no other markings* is inherently prejudicial and therefore should not have been given to the jury with the rest of the photographs. This argument may be disposed of in summary fashion.

First of all, appellant Contreras did not object to the photograph in question at the time of admission in evidence (578). Instead, he later requested that the profile view of appellant Contreras be "cut off" from the exhibit

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[20] Although appellant Contreras' trial counsel cross-examined Brown as to whether the hijacker wore sunglasses, he did not ask him the crucial question of whether the individual's eyes were visible through the sunglasses (589).

[21] On this appeal, neither appellant challenges the sufficiency of the trial court's cautionary instructions on this issue.

in evidence. The trial court refused to alter the exhibit at that point.

Second, as appellant Contreras concedes in his brief (p. 17), the law of this circuit is quite clear that "mug shot" type photographs are admissible if: (i) there are no visible markings on the photographs and (ii) their introduction is not accomplished in a manner which would cause the jury to infer that there was something "highly damaging or suspicious about the pictures themselves". *United States* v. *De Sena*, 490 F.2d 692, 696 (2d Cir. 1973). Appellant Contreras concedes that the photograph in question had no visible markings and that all discussions as to its admission were made outside of the presence of the jury.

Finally, the United States offered to inform the jury that the photograph in question was taken in connection with the instant case and no other. The trial court acceded to this request but appellant Contreras' counsel made no response to this offer (638-639). Thus, appellants' counsel was given the opportunity to completely foil any jury inference that the photograph indicated that the appellant Contreras had a prior record. *United States* v. *De Sena*, 490 F.2d 692, 696 (2d Cir. 1973).

POINT IV

APPELLANT DiGISO'S CONVICTIONS FOR THEFT AND POSSESSION OF GOODS STOLEN IN INTERSTATE COMMERCE ARE NOT DUPLICITOUS.

Appellant DiGiso argues that his conviction on two counts of theft and two counts of possession of the same goods is duplicitous. Appellant's contention is frivolous and completely contrary to the established holdings of this Court.

The Federal Interstate Shipment Act, Title 18, United States Code, Section 659 (1966), sets forth separate and distinct offenses for the crimes of theft and possession. This Court has on numerous occasions upheld convictions based on both the theft and subsequent possession of the same property. E.g., *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *Meduri*, 457 F.2d 330 (2d Cir. 1972). The record in the instant case is clear that appellant DiGiso not only participated in the thefts in question but thereafter also actively took part in their illegal sale.[22] Thus, any claims of error is frivolous.

POINT V

TESTIMONY OF SUBSEQUENT CRIMINAL ACTS WAS PROPERLY INTRODUCED ON THE ISSUE OF COMMON PLAN OR SCHEME.

Appellant DiGiso alleges the district court erred in allowing testimony of his criminal activity subsequent to the termination of the conspiracy charged.

Rule 404(b) of Federal Rules of Evidence states that evidence of prior or subsequent similar acts is admissible to prove motive, intent, common plan or knowledge. The rule merely codifies what had previously been case law for many years. See, e.g., *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Warren*, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972). Because motive, intent, common plan, etc., are difficult to prove by direct

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[22] It should also be noted that appellant DiGiso received concurrent sentences on his separate convictions for theft and possession.

evidence and it is often the case that evidence of prior or subsequent acts is the best method for establishing these elements.

The evidence in dispute consisted of Tavolacci's testimony that two weeks after the last hijacking charged in the indictment (Carolina Mills—June 28, 1973), Tavolacci, Contreras, and DiGiso went riding in Contreras' car in an unsuccessful hunt for a truck to hijack. (99-100). This testimony, corroborated by surveilling FBI agents (717-721, 831), clearly illustrated the *modus operandi* employed in the four previous hijackings. The evidence was not, therefore, offered solely to show the bad character of the accused and was consequently admissible. Rule 404(b), Fed. Rules Crim. Proc.; see also, *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 412 U.S. 950 (1975).

POINT VI

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY AS TO THE INFERENCE THAT MAY BE DRAWN FROM THE RECENT POSSESSION OF STOLEN PROPERTY.

Appellant DiGiso argues that the facts of the instant case did not warrant a jury instruction as to "recent possession of stolen property". Appellant's argument ignores the substantial evidence in the record which placed him in possession of hijacked merchandise shortly after three of the thefts.[23]

Co-conspirator Tavolacci testified that appellant DiGiso participated in each of the four hijackings set forth

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[23] Appellant's brief fails to cite a single case in support of his contention.

in the indictment. He further testified that DiGiso informed him of the circumstances under which appellant DiGiso personally had "fenced" the contents of three of the four hijacked shipments (65-68, 79, 89). The Tavolacci testimony, in this regard, was corroborated by the testimony of the "fences" themselves. Robert Trabulsi purchased two hijacked shipments from appellant DiGiso, both within two weeks of the date of each theft (277-278, 280-282, 285-286).[24] Bernard Mass also purchased the contents of the April 27 United Merchant's hijacking from DiGiso. Although Mass was unable to directly identify DiGiso as the "seller", he had conversed with on the phone, circumstantial evidence led to the overwhelming inference that DiGiso was that individual.[25]

Evidence of the nature outlined above is clearly sufficient to warrant the charge in question. The jury justifiably could draw an inference from the uncontradicted testimony that Mr. DiGiso was selling hijacked goods shortly after their theft. *Barnes* v. *United States*, 412 U.S. 837 (1973); *United States* v. *Dekunchak*, 467 F.2d 432 (2d Cir. 1972). Thus, the charge was proper.

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[24] Appellant DiGiso phone records, which were admitted in evidence, showed calls to Trabulsi's business, Vanguard Knits, around the time of the hijackings. (943-944).

[25] DiGiso took Tavolacci to both the Mass store in New Jersey (Harris Department Store) and to Mass' father's house in order to collect money owed for the sale of the hijacked goods (65-68). Mass confirmed that he told the "seller" of the goods to see Mass' father for part of the money (384-385). Moreover, appellant DiGiso's phone records showed several calls to both Mass' store and to the home of Mass' father shortly after the hijacking. (940-944).

POINT VII

THE TRIAL COURT'S FAILURE TO PERMIT DEFENDANT TO DISPLAY HIS HAND TO THE JURY WITHOU UNDERGOING FULL CROSS-EXAMINAION WAS HARMLESS ERROR.

During the defense case, appellant Contreras sought to display his right hand to the jury and to limit his cross-examination to whether he ever had a certain scar, rather then undergoing full cross-examination concerning the issue of his identity as one of the hijackers of the United Merchant's truck seized on April 27, 1973. The purpose of this display would have been to show the jury that his right hand did not contain a scar, such as that testified to by the witness Snead according to a stipulation between the government and the defense. However, because of Contreras' simultaneous refusal to undergo cross-examination as described above, the trial court refused to permit the introduction of this evidence.

Certainly, the ordinary rule is that a defendant who offers himself as a witness at trial also submits himself to cross-examination. See, e.g., *United States* v. *Augello*, 452 F.2d 1135 (2d Cir. 1971), *cert. denied*, 406 U.S. 996 (1972). Apparently, the trial court applied this well-settled rule in refusing to allow this evidence under the limitation sought by the appellant. The Government recognizes, however, that where a defendant seeks, demonstratively and not by way of testimonial evidence, to exhibit what he considers to be a relevant portion of his body, he may be permitted to do so without also testifying. Cf. *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972).

It is submitted that the court's refusal to permit appellant Contreras to so exhibit his hand was, at worst harmless error. The evidence in the case, as set

forth above, was compelling as to Contreras' guilt. To have permitted appellant Contreras to exhibit his presumably scarless hand almost three years after the events in question and under conditions that would preclude full exploration of the identity issue, to which this offer of evidence related, would have unquestionably have been preferable; however, the ruling of the trial court, under these circumstances was not prejudicial error.[26]

POINT VIII

THE TRIAL COURT'S CHARGE ON "SPECIFIC INTENT" WAS CORRECT.

Appellant DiGiso urges this Court to reverse the conviction below on the grounds that that following phrase was erroneously included in the trial Court's charge on conspiracy:

> It is ordinarily reasonable to infer a person intends the natural and reasonable consequences of acts knowingly done or knowingly omitted. (1101).

Appellant suggests that this phrase standing alone, "lessens the degree of proof needed to convict the defendant of conspiracy." (Appellant DiGiso's brief p. 7).

This Court has, in the past, criticized the use of "the natural and probable consequences" charge. *United States* v. *Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975); *United States* v. *Congiano*, 491 F.2d 906 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974); *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966). Apparently, this Court

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[26] In view of the fact that there was no testimony as to whether the scar was of a permanent character, to have permitted this display, without more, would have been, it is argued, of limited probative value.

is concerned that inclusion of this charge could result in a conviction even though the Government had failed to establish a defendant's "specific intent to violate the substantive statute beyond a reasonable doubt". *Bertolotti, supra.* An examination of the trial court's entire charge of conspiracy in this case quickly dispels any doubt that the jury was properly instructed on the issue of specific intent.

First, the trial court enumerated the essential elements of the crime of conspiracy and expressly indicated that the jury must find among that: (1) the conspiracy was wilfully formed for the purposes of committing the substantive offenses set forth in the indictment; and (2) that each defendant knowingly and wilfully became a member of that conspiracy with the intent to further one of its objectives (1092).

Second, the trial court indicated that the jury must find beyond a reasonable doubt that a defendant wilfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy (1096).

Third, the court also charged as follows:

> To act or participate wilfully means to act or participate voluntarily or intentionally and with *specific intent* to do something unlawful.
>
> That is to say, to act or participate with bad purpose either to disobey or disregard the law. So, if the defendant or any other person, understanding of [sic] the unlawful character of the plan, *knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilfull participant, a conspirator* (emphasis added; 1096-1097).

Fourth and finally, the Court defined knowingly and wilfully by stressing the element of specific intent to break the law. (1100). Only in order to further clarify the means by which knowledge and intent may be proved, did the trial court then charge as follows:

> Knowledge and intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's knowledge or intent from the surrounding circumstances. You may consider any statement made and one or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind.
>
> It is ordinarily reasonable to infer a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. (1100-1101).

This Court in *United States* v. *Barash*, 365 F.2d 395, 402 (2d Cir. 1966), while approving the use of the first paragraph quoted above, indicated the second quoted paragraph was a platitude serving no useful purpose. Surely its use in the instant case, especially when taken in conjunction with the other portions of the charge set forth above, constitutes harmless error, if error at all. This Court's concern as expressed in the *Bertolotti* decision that a jury would not be charged on "specific intent" is simply not present in the instant case. Therefore the charge as given was proper.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: September 8, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 13th day of September, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF AND APPENDIX FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Paul E. Warburgh, Jr., Esq.	Jeffrey W. Waller, Esq.	Marc A. Rosenberg, Esq.
122 E. 42nd Street	870 New York Avenue	200 Garden City Pla
New York, N.Y. 10017	Huntington, N.Y. 11743	Garden City, NY 11530

Evelyn Cohen

Sworn to before me this
13th day of Sept. 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977